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FILED
MAY 1 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960

No. 584

YALE TRANSPORT CORP., EMPIRE CARRIERS CORP. and STONE'S EXPRESS, INC.,

Appellants,

RAILWAY EXPRESS AGENCY, INCORPORATED, BILKAYS EXPRESS CO., JERSEY COAST FREIGHT LINES, INC., MAHON'S EXPRESS and PARCEL DELIVERY SERVICE, INC.,

Intervenor-Appellants,

AGAINST

UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,

Appellees,

UNITED PARCEL SERVICE, INC.,

Intervenor-Appellee.

PETITION FOR REHEARING

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PETITION FOR REHEARING

Yale Transport Corp., Empire Carriers Corp., Stone's Express, Inc. and Railway Express Agency, Incorporated (herein collectively called "Appellants"), respectfully petition, pursuant to Rule 58 of the Revised Rules of the Supreme Court of the United States, for a rehearing of the judgment of the Supreme Court entered herein on March 20, 1961, which affirmed (Mr. Justice Black dis-

senting) the decision of the United States District Court for the Southern District of New York. In support of the petition, Appellants respectfully show and allege:

I

This Honorable Court foreclosed proper consideration of important questions concerning the interpretation and meaning of at least two of the more important sections (49 U.S.C. Sections 5 and 307) of the Interstate Commerce Act (herein called the "Act") by rejecting oral argument and by denying Appellants an adequate opportunity to develop the issues by comprehensive briefs.

Appellants respectfully submit that this Honorable Court's judgment of affirmance establishes a precedent which is contrary to the letter and spirit of the Act and subverts the intent and objectives of Congress. Moreover, the judgment of affirmance renders earlier decisions of this Honorable Court meaningless or, at least, of dubious authority.

II

Appellants have repeatedly alleged (as the Interstate Commerce Commission [herein called the "Commission"] and Intervenor-Appellee ultimately conceded) that Intervenor-Appellee (herein called "U.P.S.") was and still is a party to an unlawful control relationship between and among U.P.S., its parent and various other motor carrier subsidiaries of the parent. Since the control relationship was created subsequent to the passage of the Act (in 1935), the approval of the Commission, under Section 5 of the Act, was required but never obtained. Accordingly, when U.P.S. applied for a Certificate of Public Convenience and Necessity, it was then party to an unlawful control relationship which carried with it important monopoly impli-

cations. At no time during the course of the proceedings before the Commission did U.P.S., the parent or the other subsidiaries of the parent file an application with the Commission seeking to correct the illegal control arrangement or to legalize it by an appropriate proceeding. These facts are not in dispute but were apparently overlooked by this Honorable Court.

Prior to the decision in this case, the Commission consistently held that an application for a Certificate of Public Convenience and Necessity would not be approved if the applicant was a party to an unlawful control relationship in violation of Section 5 of the Act. *M. J. Hannon—Control—Hannon Motor Lines, Inc.*, 39 M.C.C. 620 (1944); *Schwerman Trucking Co.—Control—Schwerman Trucking Co. of Texas*, 80 M.C.C. 382 (1959).

Indeed, the Commission had rejected the contrary conclusion of *Pan American Airways Co.* v. *Civil Aeronautics Board*, 121 F. 2d 810 (CA 2, 1941). The Second Circuit in the *Pan American* case, *supra* held that under comparable provisions of the Civil Aeronautics Act (49 U.S.C. Sections 1301 *et seq.*) an applicant was not barred from receiving a new license from the Civil Aeronautics Board despite the fact that there was illegal control. However, the Commission, in the *Hannon* case, *supra*, specifically and unequivocably rejected the principle of the *Pan American* case, *supra*. In short, the position of the Commission was that new authority would not be granted under Section 207 of the Act (49 U.S.C. Section 307) where unlawful control, in violation of the Act, had been accomplished. In the absence of judicial decisions to the contrary, the Commission's consistent construction of the Act was and is entitled to great weight. *Service* v. *Dulles*, 354 U. S. 363, 1 L. ed. 2d 1403 (1957); *United States of America* v. *Leslie Salt Company*, 350 U. S. 383, 100 L. ed. 441 (1956); *United States of America* v. *American Truck-*

ing Associations, Inc., et al., 310 U. S. 534, 84 L. Ed. 1345 (1940). The departure from this unvaried interpretation by the Commission in the case at bar is unexplained and should have been condemned. *Florida* v. *United States*, 282 U. S. 194, 74 L. ed. 291 (1939); *Secretary of Agriculture of the United States* v. *United States*, 347 U.S. 645, 98 L. ed. 1015 (1954). What is significant is that the judgment of affirmance by this Honorable Court adopts the Commission's unexplained departure from statutory provisions and decisional principles without suggesting in what respects the Commission's new view accords with the law. The fact is that there was no rational explanation for the departure by the Commission from the principle of the *Hannon* case, *supra*.

It is also evident that the Court below erroneously concluded that *Pan American, supra*, was controlling although the Commission had held to the contrary in its own decisions. The judgment of affirmance by this Honorable Court compounds the error.

It is also clear that the statute and prior decisions by this Honorable Court precluded the issuance of a Certificate of Public Convenience and Necessity to anyone who, like U.P.S., is currently in violation of Section 5 of the Act (49 U.S.C. Section 5). Section 207 of the Act (49 U.S.C. Section 307) expressly provides that a Certificate shall not be granted where an applicant does not "conform to the provisions of this chapter and the requirements and rules and regulations of the Commission . . . ." U.P.S. could not comply with the "provisions of this chapter" so long as it violated Section 5, as it surely has and does. Illegal control, proscribed by Section 5, cannot be waived nor is it a matter which, in the exercise of administrative discretion, can be ignored as the Court below erroneously held. The language of the statute is clear, unambiguous and mandatory. Thus, in *United*

States v. *Marshall Transport*, 322 U.S. 31, 88 L. ed. 1110 (1944) and *Alleghany Corp.* v. *Brayswick & Co.*, 353 U.S. 151, 1 L. ed. 2d 726 (1957) this Honorable Court held that Section 5 issues are jurisdictional. Hence, the Commission could not, as a matter of law, issue a Certificate to U.P.S. This important legal consideration was apparently overlooked by this Honorable Court.

Contrary to the contentions of the Appellees, U.P.S. would not be penalized by a retroactive application of the *Marshall* case, *supra*. Appellants have never contended that the United Parcel family be required to divest itself of any authority previously granted by the Commission. Appellants do contend, however, that the *status quo* should not be altered by a special reward to U.P.S. and that new authority, should not have been granted to U.P.S. unless and until the illegal control relationships was cured by an appropriate proceeding under Section 5 of the Act. This issue was squarely presented in this case and the Commission had the statutory duty and obligation to withhold issuance of a Certificate pending the resolution of the unlawful control questions raised by the Appellants. If the Commission had not altered the *status quo* by granting a new Certificate, then the refusal to institute an investigation, as requested by Appellants in a companion proceeding, might have been warranted. But when new authority was granted, the status of U.P.S. was altered and the Commission was required to approve the control relationship, as a condition precedent to the issuance of a Certificate.

In any event, the *Marshall* case, *supra*, was decided long before the U.P.S. proceeding was instituted and Appellees are presumed to know the law. Accordingly, the control matters could and should have been decided by the Commission before any Certificate was issued to U.P.S.

In effect, the judgment of this Court sanctions the grant of licenses and privileges by an administrative agency to an applicant who violates the law administered and enforced by that agency even where the statute has been construed by this Court so as to preclude the challenged administrative action.

III

There has been a radical departure by this Court from the principles enunciated in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 95 L. ed. 456 (1951) and the Congressional mandate of Section 10(e) of the Administrative Procedure Act (5 U.S.C. Section 1009(e)). The decision by the Court below merely rubber stamped the Commission's determination that U.P.S. had established that the Certificate was required by the present and future public convenience and necessity. But there was no independent judicial review to ascertain whether there was substantial evidence, considering the record as a whole, which supported the decision of the Commission. Thus, it was admitted that if rates are a factor in a proceeding under Section 207 of the Act (49 U.S.C. Section 307) then U.P.S. had the burden of establishing that the proposed operations could be profitably conducted at the proposed level of rates. The Court below stated that the evidence here was "meagre" and that U.P.S. would not have filed this application unless it was of the opinion that the proposed operations would be profitable. "Meagre" is not a substitute for that degree of substantial evidence which is required to support an extensive grant of operating authority.

Not only was the evidence "meagre" as to rates, but it was "meagre" as to the other essential elements of proof required to establish public convenience and necessity,

namely, that there was a public need for the U.P.S. service; that existing motor carriers (including Appellants) were unable to provide the proposed service and that there would be no adverse effect suffered by existing motor carriers by reason of the grant of a Certificate to U.P.S. There was a palpable failure to observe the substantial evidence rule and the approval by the Court below of the Commission's determination, without ascertaining whether the Commission had acted in accordance with the mandate of Congress, was wrong. *Schaffer Transportation Co. v. United States*, 355 U. S. 83, 2 L. ed. 2d 117 (1957).

IV

WHEREFORE, Appellants respectfully submit that a rehearing should be granted and upon rehearing, jurisdiction should be noted in order that an argument may be had before this Honorable Court.

Respectfully submitted

HERBERT BURSTEIN,
160 Broadway,
New York, New York,
Attorney for Appellants

Certificate

I hereby certify that this petition is presented in good faith and not for delay and I further certify that copies of this petition have been served on opposing counsel by depositing in the United States mail on this the 16th day of May, 1961.

.....
HERBERT BURSTEIN